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Restoule: Tugging on the Rope and the Duty of Diligent Implementation of Treaty Promises

By: Nigel Bankes

Case Commented On: *Ontario (Attorney General) v Restoule*, 2024 SCC 27 (CanLII)

> [T]he trial judge found that the Robinson Treaties were motivated largely by the principles of kinship and mutual interdependence, as reflected in the Covenant Chain. This enduring alliance has been depicted using the metaphor of a ship tied to a tree with a metal chain: "The metaphor associated with the chain was that if one party was in need, they only had to 'tug on the rope' to give the signal that something was amiss, and 'all would be restored'" ... The Anishinaabe treaty partners have been tugging on the rope for some 150 years now, but the Crown has ignored their calls. The Crown has severely undermined both the spirit and substance of the Robinson Treaties.
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> Per Justice Jamal at para 286

In a unanimous judgment authored by Justice Jamal, *Ontario (Attorney General) v Restoule*, 2024 SCC 27 (CanLII), the Supreme Court of Canada has confirmed that the Crown has a duty of diligent implementation of treaty promises that is informed not by fiduciary principles, but by the honour of the Crown. And in this case, the Crown was clearly in breach of that duty since, as Justice Jamal noted in words that will ring down through the decades: "For well over a century, the Crown has shown itself to be a patently unreliable and untrustworthy treaty partner in relation to the augmentation promise. It has lost the moral authority to simply say 'trust us'" (at para 262).

The Augmentation Promise of the Robinson Treaties

In 1850, William Benjamin Robinson on behalf of Her Majesty, and the Anishinaabe (Ojibewa) Indians of Lake Huron and of Lake Superior, negotiated and entered into two land cession treaties. The treaties provide for an initial payment of 2,000 pounds and a perpetual annuity of 500 pounds. Both treaties also contained an "augmentation clause" in materially identical terms. The text of the clause in the Robinson-Huron Treaty reads as follows:

> …. The said William Benjamin Robinson, on behalf of Her Majesty, Who desires to deal liberally and justly with all Her subjects, further promises and agrees that should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not

> exceed the sum of one pound Provincial currency in any one year, *or such further sum as Her Majesty may be graciously pleased to order* … (at para 43, emphasis added)

In 1850, the annuity on a per capita basis amounted to about $1.60 or $1.70 per person (the judgement uses a conversion rate of $4 to a pound). The annuity was increased once in 1875 to $4.00 per person, "the first and only increase to the annuities ever made" (at para 44.) As the Court notes in the opening paragraphs of its judgment, the question of liability for the annuities as between Canada and Ontario had previously been before the courts in *Attorney-General for the Dominion of Canada v Attorney-General for Ontario*, [1896] UKPC 51 (*"In re Indian Claims"*). In that decision the Privy Council concluded that the annuities, whether as originally stipulated or as augmented, did not constitute a trust or interest other than that of the province within the meaning of s 109 of the *Constitution Act, 1867* and thus liability for the annuities lay with Canada and not with the province.

The Litigation

The Superior plaintiffs commenced an action against Canada and Ontario in 2001 and the Huron plaintiffs followed with their own action in 2014. The actions were tried together in three stages. Stage 1 dealt with interpretation (2018 ONSC 7701, 2021 ONCA 779), Stage 2 dealt with Ontario's defences based on Crown immunity and limitations (2020 ONSC 3932, 2021 ONCA 779). Stage 3 deals with the plaintiffs' claim for damages and allocation of any award as between Canada and Ontario. Prior to the hearing of Stage 3, Canada, Ontario, and the Huron plaintiffs reached a settlement which has now been finalized and approved: 2024 ONSC 1127 (CanLII). The Stage 3 proceedings in relation to the Superior plaintiffs alone concluded in September 2023 but judgment has been stayed by order of Chief Justice Wagner (at para 62).

It is convenient to note at the outset that Justice Jamal concluded that the plaintiffs' treaty actions were not time barred by Ontario's *Limitations Act*, largely it seems on the basis that a breach of treaty claim did not fall within any of the specific causes of action listed in the Ontario statute (at paras 198-217).

Interpretation of the Augmentation Promise

Justice Jamal proceeded (after significant discussion) on the basis that the standard of review for the interpretation of historic treaties is correctness. Factual findings, including findings of historical fact that may inform the interpretation, attract deference (at paras 67-119). The court followed the two-step approach to treaty interpretation adopted by Justice McLachlin in *R v Marshall*, 1999 CanLII 665 (SCC), [1999] 3 SCR 456, a framework that as Justice Jamal notes "reflects the current state of the law" and has been cited with approval in many decisions (at para 81). The first step focuses on the words of the treaty and identifies the range of possible interpretations. At the second step "the court considers those interpretations against the treaty's historical and cultural backdrop" (ibid). Justice McLachlin's well known nine principles (quoted at para 79) inform both steps in the process.

At the first step Justice Jamal identified four possible interpretations of the augmentation clause: (1) any legal duty to augment was capped at $4 per person, any augmentation beyond that was at

the Crown's unfettered discretion; (2) the Crown was obliged to augment per person allocations when economic circumstances permitted, (3) the Crown was obliged to augment individual payments to the ceiling of $4 per person (after which some discretion), plus a duty to augment payments to the collective when economic circumstances permitted, and (4) a single obligatory payment to the collective up to a "soft cap" calculated by reference to $4 per person, and in addition, if the economic condition is met, (i.e., "without incurring loss") an ongoing power ("or such further sum as Her Majesty may be graciously pleased to order") to make additional payments to the collective (at paras 139-150). Both the trial judge and the majority of the Court of Appeal favoured the third option (at para 157) while the minority of the Court of Appeal favoured the fourth option (at para 158).

In the second step Justice Jamal proceeded to analyze each of these possible interpretations "against the treaty's historical and cultural backdrop." The first interpretation was, according to Justice Jamal, "a legal impossibility" because "[a]n interpretation based on unfettered discretion does not fit within Canadian notions of legality and cannot reflect the common intention of the parties to the Robinson Treaties" (at para 152). I note that this a very "public law" reading of the treaty: all the cases that Justice Jamal relies upon for this proposition are public law cases including, most famously, *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC), [1959] SCR 121.

Justice Jamal dealt with the second, third, and fourth options together on the basis that the second option (a duty to augment when the economic condition was met) was a necessary component of both the third and fourth options. Justice Jamal ultimately preferred the fourth option. In doing so, he rejected the proposition, as had the Court of Appeal, that the treaties required that the Anishinaabe receive a "fair share" of net Crown revenues from the ceded territories. Instead, Justice Jamal considered that any sharing should be "effected by an exercise of Crown discretion that reflects the honour of the Crown and abides by the Crown's promise to the Anishinaabe 'to deal liberally and justly with all Her subjects,' having regard to the relative wealth and needs of all the Crown's subjects, signatories and non-signatories alike" (at para 181). The Anishinaabe's acceptance of the Crown's discretionary power in relation to the augmentation clause "was entirely consistent with the Anishinaabe's conceptions of a good leader, and reflected the principles of respect, responsibility, reciprocity, and renewal. The Robinson Treaties recognized the Anishinaabe's authority to conclude agreements to share their territory and their responsibility to their people, embodied the idea of reciprocity and mutual dependence, and cemented a longstanding nation-to-nation relationship that would be renewed in perpetuity" (at para 195). But the Crown's discretionary power "is not unfettered; it is justiciable and reviewable by the courts" (at para 196) both as to timing and substance and must be exercised "diligently, honourably, liberally, and justly, while engaging in an ongoing relationship with the Anishinaabe based on the values of respect, responsibility, reciprocity and renewal" (at para 197).

Is the Crown's Discretionary Power Fiduciary in Nature?

Once Justice Jamal had settled on the correct interpretation of the augmentation promise, it was necessary to consider what principles might inform and constrain the Crown in the exercise of this discretionary power, specifically, whether the power might be subject to an *ad hoc* or *sui generis* fiduciary duty. In the end, Justice Jamal concluded that the treaty power could not be characterized in either way, although both the court and the parties agreed that "the honour of the Crown", albeit

not a cause of action, "must guide the interpretation and implementation of the Augmentation Clause and the appropriate remedies for the Crown's past breach …" (at para 218).

For Justice Jamal, the treaty power could not be subject to an *ad hoc* fiduciary duty since the plaintiffs could not fit the power within the three-fold test for an *ad hoc* duty: "(1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiaries; (2) a defined class of beneficiaries vulnerable to the fiduciary's control; and (3) a legal or substantial practical interest of the beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control …" (at para 228). More specifically, the plaintiffs could not get past the first branch of the test since "[t]here is no evidence that the Crown undertook to act in the best interests of the Huron and Superior plaintiffs in relation to the treaty promise" (at para 229). Instead, the treaty text expressed the Crown's "desire to deal liberally and justly *with all Her subjects*" (at para 232, emphasis added) which effectively contradicted the signature duty of undivided loyalty of a fiduciary.

Neither was it possible to being the treaty power within the Court's jurisprudence on *sui generis* fiduciary duties. That jurisprudence, notably *Wewaykum Indian Band v Canada*, 2002 SCC 79 (CanLII) and *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 (CanLII), requires "(1) a specific or cognizable Aboriginal interest; and (2) a Crown undertaking of discretionary control over that interest" (at para 234). In this case, Justice Jamal seems to have qualified the first part of the test still further by suggesting a "general principle that specific or cognizable Aboriginal interests cannot be established by treaty or legislation" (at para 238). Justice Jamal's conclusion that the augmentation obligation of the Robinson treaties may not be a sufficiently specific cognizable interest relating to particular lands (such as surrendered reserve lands) may be correct, but it is far from obvious why there should be a "general principle that specific or cognizable Aboriginal interests cannot be established by treaty or legislation." After all, in *Guerin v The Queen*, 1984 CanLII 25 (SCC), [1984] 2 SCR 335, Justice Wilson was of the view that while "s. 18 [of the *Indian Act*] does not *per* se create a fiduciary obligation in the Crown with respect to Indian reserves, I believe that it recognizes the existence of such an obligation …" (at 348-349 and see also at 352 and at 354-355). Similarly, in his leading judgment in the same case (and preferring a fiduciary analysis rather than Justice Wilson's trust analysis), Justice Dickson also relies in part on the language of s 18 of the *Indian Act* (ibid at 383-384 and 387).

The Honour of the Crown and the Duty of Diligent Implementation of Treaty Promises

But even if the Crown was not under a fiduciary obligation in implementing the augmentation promise, all parties before the Court agreed that the honour of the Crown required it "to diligently fulfill or implement" that promise (at para 248). The duty of diligent implementation was first articulated in a statutory and constitutional context in *Manitoba Metis* but has since been carried over into treaties, most notably in *Yahey v British Columbia*, 2021 BCSC 1287 (CanLII) at paras 1779-87, a treaty 8 case (see ABlawg posts by Hamilton and Ettinger here and here), but also into modern treaties (Justice Jamal references *First Nation of Nacho Nyak Dun [Peel River Case] v Yukon*, 2017 SCC 58 (CanLII) at para 52 but a far more pertinent reference is the more recent *First Nation of Na-Cho Nyäk Dun [Majestic Mines Case) v Yukon (Government of)*, 2024 YKCA 5 (CanLII)).

But what did the duty of diligent implementation mean in this case? A principal issue at the outset was whether the duty is purely procedural or also substantive (at para 260). Justice Jamal had little hesitation in concluding that the duty attracted both procedural and substantive elements and that judicial supervision would apply to both elements (at paras 261-264.) Furthermore, the Crown was clearly in breach of both its procedural and substantive obligations:

> I cannot accept Ontario's submission that a purely procedural duty — by which the Crown is simply required to "consider" or "turn its mind" to discretionary increases to the annuities from time to time — would maintain the honour of the Crown or effect reconciliation between the parties. Since 1875, when the first and only increase to the annuities was made, the Crown has failed to consider whether it can increase the annuities without incurring loss and, if so, to exercise its discretion to determine whether and by how much to increase them. For well over a century, the Crown has shown itself to be a patently unreliable and untrustworthy treaty partner in relation to the augmentation promise. It has lost the moral authority to simply say "trust us" (at para 262).

As an aside, I note that while Justice Jamal concludes that there is little domestic jurisprudence on the duty of diligent implementation of treaties (at para 259), there is a considerable jurisprudence on due diligence obligations (both treaty and customary) in international law. See, for example and most recently, the *Climate Change Advisory Opinion* of the International Tribunal of the Law of the Sea (21 May 2024).

Remedies

The next step was to consider what might be an appropriate remedy for the Crown's failure to diligently implement the augmentation promise. Reasoning from *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII) at para 45 that "[t]he controlling question . . . is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake," Justice Jamal concluded that it was appropriate to provide the plaintiffs with both declaratory relief as well as "further direction".

Justice Jamal made the following six declarations:

1. Under the Augmentation Clause of the Robinson Treaties, the Crown has a duty to consider, from time to time, whether it can increase the annuities without incurring loss.

2. If the Crown can increase the annuities without incurring loss, it must exercise its discretion as to whether to increase the annuities and, if so, by how much.

3. In carrying out these duties and in exercising its discretion, the Crown must act in a manner consistent with the honour of the Crown, including the duty of diligent implementation.

4. The Crown's discretion must be exercised diligently, honourably, liberally, and justly. Its discretion is not unfettered and is subject to review by the courts.

5. The Crown dishonourably breached the Robinson Treaties by failing to diligently fulfill the Augmentation Clause.

6. The Crown is obliged to determine an amount of honourable compensation to the Superior plaintiffs for amounts owed under the annuities for the period between 1875 and the present. (at para 304).

But declaratory relief on its own was "insufficient given the egregious and longstanding nature of the breaches at issue in these appeals. In these circumstances, a simple declaration would not adequately repair the treaty relationship or restore the honour of the Crown. It would not sufficiently vindicate the treaty rights or meaningfully advance reconciliation" (at para 283).

As for the further direction that would be required, Justice Jamal was concerned that such direction should be sensitive to the nature of the treaty promise, be respectful of the proper role of the judicial branch and recognize, as per *Haida* above, the importance of renewing the treaty relationship.

The treaty promise was not a promise to pay a certain sum of money; it was instead "a promise to consider whether the economic conditions allow the Crown to increase the annuities without incurring loss and, if they do, to *exercise its discretion* and determine whether to increase the annuities and, if so, by how much" (at para 290, emphasis in original). Accordingly, the Crown, even after all these years, should be accorded the opportunity "through honourable engagement with its treaty partners" to propose a settlement (ibid). Absent an agreed settlement, "the Crown will be required to explain to the Superior plaintiffs and the court how it reached its determination and why. This would permit the court to pay careful attention to the manner in which the Crown exercised its discretion, having regard to both the amount determined and the process by which it arrived at that amount, when assessing whether the Crown's determination is honourable" (ibid).

This approach was also consistent with the judicial role. The exercise of discretion in fixing the amount that the Crown should pay is a polycentric exercise in which the Crown must have regard to the responsibility "to deal liberally and justly with all Her Subjects" (at para 296, emphasis in original) This responsibility "is well within the expertise of the executive branch, but is much less within the expertise of the courts" (at para 297). On the other hand, "it is very much the business of the courts to review exercises of Crown discretion for constitutional compliance — to ensure that the Crown exercises its discretion in accordance with its treaty obligations and the constitutional principle of the honour of the Crown" (at para 299.)

And finally, the direction to the Crown to engage with its treaty partners was also consistent with the idea of the treaties as honouring a relationship rather than as transactional instruments (at para 300). While "the augmentation promise does not expressly require the parties to negotiate and agree on an annuity increase, it is undeniable that negotiation and agreement outside the courts have better potential to renew the treaty relationship, advance reconciliation, and restore the honour of the Crown" (at para 303).

In light of these three considerations, and in addition to the six declarations listed above, Justice Jamal, "[w]ith a view to respecting the nature of the treaty promise, repairing the treaty relationship, restoring the honour of the Crown, and advancing reconciliation" directed the Crown

"to engage *meaningfully* and *honourably* with the Superior plaintiffs in an attempt to arrive at a just settlement regarding past breaches. If such a settlement cannot be mutually agreed upon, the Crown will be obliged, within six months of the release of these reasons, to exercise its discretion and determine an amount to compensate for past breaches" (at para 305, emphasis in original).

It also followed from this that the Stage 3 proceedings should be stayed for the same period and while the Superior plaintiffs would have leave to seek a further extension the Crown could not (at para 307). If the parties cannot reach a negotiated settlement, then "the Superior plaintiffs may seek review before the courts of both the process the Crown has undertaken and the substantive amount it has determined as compensation" (at para 307). That presumably would take the form of the Stage 3 proceedings "modified in accordance with these reasons" (ibid). Finally, Justice Jamal offered guidance in the form of a non-exhaustive list of factors that the Crown should consider in any proposed settlement:

> (a) the nature and severity of the Crown's past breaches, including the Crown's neglect of its duties for close to a century and a half; (b) the number of Superior Anishinaabe and their needs; (c) the benefits the Crown has received from the ceded territories and its expenses over time; (d) the wider needs of other Indigenous populations and the non-Indigenous populations of Ontario and Canada; and (e) principles and requirements flowing from the honour of the Crown, including its duty to diligently implement its sacred promise under the treaty to share in the wealth of the land if it proved profitable (at para 309; and a similar list at para 271).

Conclusions

I think that *Restoule* will come to be recognized as one of the Court's most significant treaty cases – certainly its most significant treaty case since *Marshall* – and it is all the more significant because it is a unanimous judgment. I say this for two principal reasons.

First, the decision is based on a deeply contextual reading of the 1850 treaties, which begins pre-contact with a consideration of the Anishinaabe's system of law and governance based on the values of *respect*, *responsibility*, *reciprocity*, and *renewal* (at paras 17-18) and continues with a discussion of the Covenant Chain (at paras 19-20). These are not mere recitations. Justice Jamal uses these references throughout his judgment to justify his preferred interpretation of the augmentation promise, to inform the meaning of the honour of the Crown in this particular context, to emphasize the relational rather than transactional nature of historic treaties, and, perhaps most significantly, to inform his discussion of remedies.

Second, the Court has fully endorsed the proposition that the honour of the Crown supports a duty of diligent implementation of treaty promises. While the decision is specific to the Robinson treaties, and indeed to a specific clause in the Robinson treaties, there is nothing to suggest that the Court's reasons should be so confined. Indeed, by referring to the *Yahey* decision and *Chippewas of Nawash Unceded First Nation v Canada (Attorney General)*, 2023 ONCA 565 (CanLII) with apparent approval, the Court has endorsed the application of the duty of diligent implementation of promises to other historic treaties, including the numbered treaties. Given that, the Crown would do well to remember Justice Greckol's observation in her separate concurring

opinion in *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 (CanLII) (and see ABlawg comment here) in the context of the 'lands taken up' clause of the numbered treaties, that a treaty promise may be "easy to fulfill initially" but become increasingly "difficult to *keep* as time goes on and development increases" (at para 80, emphasis in original).

I think that the decision also offers important guidance on the application of fiduciary law in the context of Crown-Indigenous relations. I suspect that some will be disappointed by what may be seen as a backing away from some of the Court's more general statements as to fiduciary obligations and relationships (e.g., *R v Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075 at 1108) but in my view it is more convincing to view the honour of the Crown rather than a fiduciary relationship as the general organizing principle while recognizing that in some cases the court should impose a fiduciary duty.

There are of course some puzzles in the case. I have already referred in the body of the comment to one aspect of Justice Jamal's treatment of *sui generis* fiduciary duties that seems problematic. Another puzzle is why, just as in the Court's other recent historic treaty case *Canada v Jim Shot Both Sides*, 2024 SCC 12 (CanLII) (see the postscript in this ABlawg post on the *Dickson* decision discussing this point), the Court makes no reference to the United Nations Declaration on the Rights of Indigenous Peoples notwithstanding its decision in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 (CanLII) (ABlawg post here) to the effect that the Declaration has been incorporated into the country's positive law.

And Justice Jamal does not weigh-in on the allocation of responsibility for treaty implementation as between Canada and Ontario. But that of course is understandable. This is one of the issues that is before the trial court in the adjourned Stage 3 proceeding and is an issue that the parties will have to resolve either in settlement discussions (as was the case with Huron plaintiffs) or in the resumed Stage 3 proceedings. In the meantime, it is the Crown writ large that continues to bear the shame of the continuing breach of its treaty obligations.

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